No. 75-1728

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In the Supreme Court of the United States

OCTOBER TERM, 1975

C. CLYDE ATKINS, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA

LOUIS C. BECHTLE, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

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Washington, D.C. 20530.

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This memorandum presents the government's views concerning the question certified to this Court by the United States Court of Claims under 28 U.S.C. 1255(2).

The certified question is (Certificate 6):

> In view of the express provisions of Pub. L. 93-512 [88 Stat. 1609, 28 U.S.C. (Supp. IV) 455] and the resolutions of the Judicial Conference as set forth above [Canon 3C(1)(c), American Bar Association, Code of Judicial Conduct (1972)], are the judges of the Court of Claims required to disqualify themselves in these cases, or does the "doctrine of necessity" authorize and require the

judges of the Court of Claims to hear and decide these cases?

1. The "cases" before the Court of Claims, to which the certified question relates, are two actions brought by 82 United States District Judges and Circuit Judges which allege that, as a result of the effects of inflation, their "Compensation" has been "diminished during their Continuance in Office," in violation of Article III, Section 1, of the United States Constitution.[1] Plaintiffs claim that the President and Congress have taken affirmative action, contrary to this constitutional provision, to prevent any increase in judicial salaries since 1969. Plaintiffs further contend that the Senate's passage of a resolution disapproving the President's recommendations of a 7.5 percent annual salary increase for federal judges in 1974, 1975 and 1976 under the Federal Salary Act of 1967 (81 Stat. 642, 2 U.S.C. 351 *et seq.)* was an unconstitutional exercise of Executive power reserved to the President by Article II, Section 1, of the Constitution and did not constitute the enactment of legislation in accordance with the provisions of Article I, Sections 1 and 7, of the Constitution. Damages are sought under the Tucker Act, 28 U.S.C. 1491.[2]

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[1]Article III, Section 1, of the Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

[2]Although the merits of plaintiffs' claims are not before the Court, see *United States* v. *Barnett*, 376 U.S. 681, 689-690, n. 6, the government's defenses to these claims are set forth in Defendant's Motion to Dismiss the Petitions, filed April 20, 1976, and

Although none of the judges of the Court of Claims is a party to these lawsuits, and the named plaintiffs do not purport to represent a class of all federal judges, it appears unquestioned that the effect of any decision in favor of the plaintiffs would inure to the benefit of all judges appointed pursuant to Article III of the Constitution, including the members of the Court of Claims. See *Glidden Company* v. *Zdanok*, 370 U.S. 530. In view of their indirect financial interest in the subject matter of this controversy, the judges of the Court of Claims have sought the guidance of this Court as to whether the judicial recusal statute enacted in 1974, 28 U.S.C. (Supp. IV) 455, requires their disqualification from the determination of these cases.[3]

Defendant's Response to Plaintiffs' Motion for Summary Judgment and Reply to Plaintiffs' Response to Defendant's Motion to Dismiss, filed May 12, 1976, copies of which have been filed with the Clerk of this Court.

[3]Section 455 provides in pertinent part:

> (a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> * * * * *
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> * * * * *
>
> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding[.]

2. We believe that the judges of the Court of Claims, although they may ultimately benefit financially if plaintiffs' claims are sustained, are not required to disqualify themselves as a matter of law. In our view, the certified question already has been answered by this Court's decision in *Evans* v. *Gore*, 253 U.S. 245, which involved a challenge to the constitutionality of an income tax statute as applied to the salary of a federal judge. While acknowledging that its members had a personal financial interest in the resolution of the question presented, the Court nevertheless unanimously concluded that it was obliged to decide the case (253 U.S. at 247-248):

> Stated in its broadest aspect, the contention involves the power to tax the compensation of federal judges in general,—and also the salary of the President, as to which the Constitution (Art. II, § 1, cl. 6) contains a similar limitation. Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us; and this although each member has been paying the tax in respect of his salary voluntarily and in regular course. But jurisdiction of the present case cannot be declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his own compensation, in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go. He brought the case here in due course, the Government joined him in asking an early determination of the question involved, and both have been heard at the bar and through printed briefs. In this situation, the only course open to us is to consider and decide the cause,—a conclusion supported by precedents reaching back many years.

While the substantive holding of *Evans*—that the salaries of federal judges are immune from federal taxation—became the subject of severe academic and judicial criticism (see *O'Malley* v. *Woodrough*, 307 U.S. 277, 281 and nn. 7, 8), the Court's threshold determination of its qualifications to hear the case has been accepted as a reasonable and necessary exception to any constitutional or statutory duty of recusal. Indeed, in *Miles* v. *Graham*, 268 U.S. 501, which extended the holding of *Evans* to include the salary of a judge appointed subsequent to enactment of the income tax laws, and *O'Malley* v. *Woodrough*, *supra*, which overruled *Miles*, the Court addressed the merits without any preliminary discussion of the propriety of its hearing the case.

This "rule of necessity," we submit, is a salutary principle that is essential to assure that litigants are not deprived of the right to invoke the jurisdiction of the federal courts to seek a judicial consideration of their claims. As the court noted in *Brinkley* v. *Hassig*, 83 F. 2d 351, 357 (C.A. 10):

> From the very necessity of the case has grown the rule that disqualification will not be permitted to destroy the only tribunal with power in the premises. If the law provides for a substitution of personnel on a board or court, or if another tribunal exists to which resort may be had, a disqualified member may not act. But where no such provision is made, the law cannot be nullified or the doors to justice barred because of prejudice or disqualification of a member of a court or an administrative tribunal.

See also *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 701. Here, the United States has consented to be sued for claims founded upon the Constitution or any Act of Congress and has vested exclusive original

and appellate jurisdiction over such claims in specified Article III courts. Those jurisdictional statutes would effectively be repealed *pro tanto,* and the doors to the courthouse closed to plaintiffs, unless the Court of Claims were to consider these actions.

3. Although the Court of Claims recognized the "rule of necessity" invoked in *Evans* v. *Gore, supra,* and other cases (Certificate 5-6), it questioned its continued vitality in light of the enactment by Congress of a strict judicial disqualification statute (28 U.S.C. (Supp. IV) 455) in 1974. But nothing on the face of the statute or in its legislative history suggests any intent to change that longstanding doctrine. See *United States* v. *Corrigan,* 401 F. Supp. 795, 798 (D. Wyo.). To the contrary, statements in the committee reports and hearings expressly indicate that Section 455 was designed merely to establish objective criteria for selecting which among many qualified judges should preside over a lawsuit; there was no intention to abrogate the rule designed to cover the unique situation where all federal judges may technically be disqualified. Indeed, the statute's list of disqualifying factors was made exceedingly broad, and the allowable waivers from its terms was narrowly limited, because of the pervasive understanding that other judges, who would not suffer from a suspect connection with the parties or issues in litigation, would be available to hear the case. Thus, in explaining the expansive language of Section 455(a), which provides that a judge should recuse himself in any proceeding in which "his impartiality might reasonably be questioned," the House Judiciary Committee Report stated:

> This general standard is designed to promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, *he should disqualify himself and let another judge preside over the case.*

H.R. Rep. No. 93-1453, 93d Cong., 2d Sess. 5 (1974) (emphasis added). Similarly, the Senate Judiciary Committee Report commented that the parties should not be permitted to waive a judicial disqualification under Section 455(b) because "[t]here are approximately 667 federal judges, active and retired. The statutes contain ample authority for chief judges to assign other judges to replace either a circuit or district court judge who becomes disqualified." S. Rep. No. 93-419, 93d Cong., 1st Sess. 7 (1973). See also Hearings on S. 1064 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 93d Cong., 1st Sess. 33, 41, 74, 91 (1973).

In view of the important purposes served by the rule requiring a judge not to recuse himself for reasons that would similarly disqualify every other judge, Congress should not be presumed to have effected a change in this established doctrine without the clearest expression of legislative intent. See *Gooding* v. *United States,* 416 U.S. 430, 457-458; *United States* v. *Enmons,* 410 U.S. 396, 411; *Rewis* v. *United States,* 401 U.S. 808, 812; *Callanan* v. *United States,* 364 U.S. 587, 594.[4] Evidence of such an intent is wholly lacking here. Moreover, the unlikelihood that Congress sought to modify the "rule of necessity" *sub silentio* is further illustrated by the fact that the language of Section 455 is virtually identical to the American Bar Association Code of Judicial Conduct, which was drafted in substantial part by members

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[4]The legislative history of prior judicial disqualification statutes (see 36 Stat. 1090; 62 Stat. 908) also does not suggest any congressional intention to abandon the "rule of necessity."

of the judiciary. Finally, one searches in vain for a logical reason why Congress would have intended to abrogate the rule. The overriding motivation behind the 1974 revision of Section 455 was to restore public confidence in the judicial system. We submit that that goal is not materially advanced by preventing one class of litigants from seeking a judicial resolution of their claims.[5]

4. Our contention that the issues raised by these lawsuits do not mandate the disqualification of every judge of the Court of Claims[6] is strengthened by an analysis of those portions of Section 455 that arguably require recusal. First, while this controversy apparently falls within Section 455(a), which provides that a judge must step aside "in any proceeding in which his impartiality might reasonably be questioned," the requirements of that section may be waived by the parties if the waiver "is preceded by a full disclosure on the record of the basis for disqualification." 28 U.S.C. (Supp. IV) 455(e). The United States hereby waives that provision.

The only provisions that seem literally to require disqualification, therefore, are Sections 455(b)(4) and (b)(5)(iii), which prohibit a judge from deciding any case in which he has "a financial interest in the subject matter in controversy" or "an interest that could be substantially

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[5]Section 455 also should be interpreted, if possible, in a manner that avoids the constitutional problems that might arise if a particular group of litigants was denied effective access to the courts. See generally Redish and Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and A New Synthesis*, 124 U. Pa. L. Rev. 45 (1975).

[6]Indeed, if Section 455 requires the recusal of members of the Court of Claims, the Justices of this Court (who, as Article III judges, also may benefit from a judgment for the plaintiffs) may be equally disqualified from answering the certified question.

affected by the outcome of the proceeding."[7] We concede that Article III judges, including members of the Court of Claims, have an interest in the outcome of these cases, and we further recognize that Section 455(e) does not permit the parties to waive this category of disqualification. We find it instructive, however, that the Code of Judicial Conduct, upon which the 1974 amendment of Section 455 was modeled, would have expressly allowed a waiver in these circumstances. See American Bar Association, Code of Judicial Conduct, Canon 3D (1972). The sole justification offered by the Senate Committee Report for rejecting this Canon and for adopting a more rigorous standard was that "confidence in the impartiality of federal judges [would be] enhanced" if another judge were chosen to replace a judge under those types of disabilities. S. Rep. No. 93-419, *supra*, at 7. See also Hearings on S. 1064 before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, *supra*, at 91. Whatever the wisdom of this conclusion, we submit that where, as here, the option of selecting another judge is unavailable, Section 455 should not be interpreted to mandate recusal; indeed, the legislative history strongly suggests that had Congress focused on the unusual problem presented by these cases, it would explicitly have made Section 455(b) waivable or inapplicable in this situation.

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[7]Indeed, it is arguable that the judges of the Court of Claims are not obliged to disqualify themselves because of the "financial interest" provisions of Section 455(b)(4). A "financial interest" in the subject matter in controversy is defined by 28 U.S.C. (Supp. IV) 455(d)(4) to include "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or active participant in the affairs of a party * * *." As noted above, any financial interest in these cases by members of the Court of Claims is indirect, since none of the judges is a party nor owns any legally cognizable interest, however small, in the judgment plaintiffs seek.

5. In sum, we believe that the judges of the Court of Claims are not required by 28 U.S.C. (Supp. IV) 455 to disqualify themselves and that the "rule of necessity" authorizes the judges of the Court of Claims to hear and decide these cases. Obviously, however, nothing in this memorandum should be construed as asserting that a judge of that court who is of the opinion that he cannot be impartial is relieved of the individual obligation to recuse himself. See 28 U.S.C. (Supp. IV) 455(b)(1). But, in our view, the members of the Court of Claims are not *ipso facto* disqualified. We have every confidence in the ability of the federal judiciary to resolve the issues in accord with the law and with each judge's oath to administer justice "faithfully and impartially." 28 U.S.C. 453.

Accordingly, we respectfully submit that the first portion of the certified question should be answered in the negative and the second portion of the certified question should be answered in the affirmative.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.